Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEVEN D. DONOVAN

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN D. DONVAN pro se.
Reg. No. 03293-089
U.S.P. Leavenworth
Leavenworth, KS.
66048-1000

74 pp

QUESTIONS PRESENTED

I.

Whether the lower courts' holding that a petitioner's claims under Section 2255 that were not presented on direct appeal were procedurally defaulted even when he demonstrated such failure was due to ineffective assistance of appellate counsel--so departed from the usual course of judicial proceedings as to warrant this Court's supervisory intervention and/or has unnecessarily created a conflict amongst the circuits?

(a) Whether a Section 2255 petitioner is entitled to an evidentiary hearing on claims which, if proven, would entitle him to relief?

(b) Whether the district court had erroneously invoked summary dismissal under Rule 4 of the Rules Governing Section 2255 Proceedings on Constitutional claims of ineffective assistance of trial and appellate counsel without first permitting petitioner to fully establish the factual basis for his claims?

PARTIES TO THE PROCEEDINGS

Petitioner Steven D. Donovan was an appellant in *U.S. v. Donovan*, No. 95-2720 (7th Cir. 1996) (unpublished order).

The United States was the only Respondent-Appelle in these proceedings.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit affirming the conviction is reproduced at pages 2a - 5a of the Appendix to this Petition and the opinion and Order of the United States District Court for the Eastern District of Wisconsin is reproduced at pages 6a - 33a of the Appendix to this Petition.

JURISDICTION

The jurisdiction of the district court was based on 18 U.S.C. Sec. 3231. The United States Court of Appeals for the Seventh Circuit, with jurisdiction pursuant to 28 U.S.C. Sec. 1291, issued its decision on December 18, 1996.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in part, states:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

Rule 4(b) of the Rules Governing Sec. 2255 Proceedings provides that:

> ...If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the

movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the U.S. Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

STATEMENT

On January 7, 1992, a grand jury returned a six-count superseding indictment charging four persons, including Petitioner Steven Donovan, with offenses related to cocaine trafficking and conspiracy to do the same.

On February 18, 1992, all four defendants proceeded to trial. A major portion of the government's allegations were based on the testimony of admitted drug dealers who cut extraordinary deals with the prosecution in exchange for their testimony.

As a consequence of trial counsel's negligence, on February 27, 1992, the jury returned guilty verdicts against each of the defendants on all counts.

In October 19, 1992, the district court, after finding Petitioner had two prior state convictions for possession with intent to distribute relatively small quantities of marijuana and cocaine, sentenced him to **LIFE** without parole.

The district court appointed counsel to represent Petitioner on direct appeal. On May 13, 1994, the Seventh Circuit, finding no merit in the issues raised by appellate counsel, affirmed Petitioner's conviction in a published opinion. *United States v. Donovan*, 24 F.3d 908.

In mid April, 1995, Petitioner notified the district court by mail that appellate counsel was ineffective for refusing to raise all his requested appellate issues. See Record of 4/22/95 and 4/23/95.

On May 1, 1995, Petitioner filed his first motion, pro se, under Sec. 2255 with annexed documents and affidavits supporting his claims of ineffective assistance of trial and appellate counsel combined with additional claims of Constitutional violations. (Record at 120) (Discussed below)

On June 9, 1995, the district court summary dismissed the Sec. 2255 Motion pursuant to Rule 4 of

the Rules Governing Sec. 2255. The court dismissed the Motion without an evidentiary hearing and without ordering the U.S. Attorney to file an answer. The court found that because Petitioner had different counsel at trial and on appeal; failure to show cause for failing to raise on direct appeal the grounds raised in his motion barred them from consideration, concluding that it plainly appears from the face of the motion and exhibits that he is not entitled to relief. App. 17a, 20a.

REASONS FOR GRANTING THE WRIT

These issues present vexing questions impacting on the requirements of Due Process contained in the Fifth Amendment to the United States Constitution.

The court below has so departed from the accepted and usual course of judicial proceedings in this cause by usual course of judicial proceedings in this cause by erroneously invoking Rule 4(b)

of the Rules Governing Sec. 2255 when Petitioner's Motion contained several meritorious Constitutional claims that would entitle him to relief.

Upon review of a question presented to this Court in *Billy-Eko v. United States*, __ U.S. __, 113 S.Ct. 2989 (1993), of whether a Sec. 2255 petitioner, raising under the Sixth Amendment an ineffective assistance of counsel challenge to his federal conviction, is procedurally barred from making that challenge for failure to raise the issue on direct appeal. The Solicitor General conceded in his brief to the Court stating that there are several justifications for allowing ineffective assistance claims to be brought on collateral attack even if not brought on direct appeal, or even for establishing a preference that the claim be brought on collateral attack. The Second Circuit Court of Appeals held on remand from this Court that ineffective assistance claims are appropriately brought in Sec. 2255 petitions even if overlooked on direct appeal.

Billy - Eko v. United States, 8 F.3d 111, 114 (1993). However, the court commented that if the defendant has new appellate counsel on direct appeal, and the record is fully developed on the ineffective assistance issue, there is little reason to extend the defendant an unlimited opportunity to delay bringing the claim. Thus, in this narrow category of cases, but only in these cases, the petitioner must still show cause for not bringing the ineffective assistance claim on direct appeal, and prejudice resulting therefrom. Id.

Circuit Discord

The lack of circuit harmony on this issue can be found in the following circuit decisions: The Third Circuit held that this Court's "cause and prejudice" standard applicable to habeas corpus petitioners announced in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584 (1982), did not apply to an ineffective

assistance of counsel claim, raised in a post conviction motion to vacate sentence and, therefore, defendant was not required to show cause and prejudice with respect to his failure to raise the claim on direct appeal. *United States v. DeRewal*, 10 F.3d 100 (1993). The government withdrew its contention--that DeRewal was required to show "cause and prejudice" with respect to his failure to raise his ineffective assistance of counsel claim on direct appeal--based on the position asserted by the Solicitor General in this Court in the case of *Billy-Eko*. *DeRewal* Id. at 103. The Solicitor General's position was that resolution of claims of ineffective assistance of trial counsel often requires consideration of matters outside the record on direct appeal and that should be considered by the district court in the first instance.

The Seventh Circuit, in affirming the summary dismissal of Petitioner's Motion, relied on their previous holding in

Guinan v. United States, 6 F.3d 468 (7th Cir. 1993), (decided one month prior to the decision of this Court in *Billy-Eko*), that claims of ineffective assistance which are based upon the trial record alone must be brought on direct appeal or they are procedurally defaulted. Id. at 472.

Judge Easterbrook concurred in this holding explaining that:

> ...a new lawyer representing a defendant on appeal finds that it is impossible to upset a conviction by pointing to his predecessor's actions. Why impossible? Because the absence of a complete record prevents definitive action. Id. at 473.

Judge Easterbrook further explained that:

> Rules of procedure should be designed to induce litigants to present their

contentions to the right tribunal at the right time. For ineffective assistance, the court of appeals on direct appeal is the wrong tribunal at the wrong time. Id. at 474.1

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1. This Court granted certiorari in *Chappell v. United States*, 494 U.S. 1075, 110 S.Ct. 1800 (1990), a case presenting a similar question. The Seventh Circuit had held that *Chappell* was barred from raising a claim of ineffective assistance of trial counsel in Sec. 2255 motion because he had been represented by new counsel on direct appeal and therefore could have raised the claim at that time. 878 F.2d 384 (1989) (judge order). Based on the position asserted by the Solicitor General, this Court vacated the judgment and remanded the case even though *Chappell* had not shown cause, as Petitioner had in the instant case, for his failure to raise the claim earlier.

Easterbrook commented that he was puzzled by the majorities conclusion that if the defendant has a new lawyer on appeal, like here, then counsel must take a futile step in order to preserve his client's entitlement to judicial review of the lawyer's performance. "Having taken this doomed step, the defendant is foreclosed from making additional arguments under Sec. 2255." Id.

A panel of the Tenth Circuit granted *en banc* review in *United States v. Galloway*, 56 F.3d 1239 (1995), to review procedures in the Circuit for asserting ineffective assistance claims. The court held that virtually all claims--even those which might conceivably be brought on direct appeal--should be brought in collateral proceedings. The court further held that the procedural rule of *Frady*, supra, does not apply to ineffective assistance claims. Id. at 1241. The Tenth

Circuit noted that they "largely agree" with the sentiments expressed in the concurring opinion of Judge Easterbrook in *Guinan*, noted above.

(a) Proper application of the statutory scheme involves a two-step inquiry:

(1) Does the record in the case conclusively negate the factual predicates asserted in support of the 2255 Motion?

(2) Would the Petitioner be entitled to the relief sought if the factual allegations which are not conclusively refuted by the record are, in fact true?

If the answer to the first question is no and the answer to the second question is yes, the district court must hold an evidentiary hearing on the factual allegations that are not conclusively refuted. *Machibroda v. United States*, 368 U.S. 487, 494-496, 82 S.Ct. 510 (1962).

The Third Circuit held in *United States v. Day*, 969 F.2d 39 (1992), that the district court judge cannot summarily dismiss a 2255 motion "unless the motion, files and records of the case conclusively establish the moving party is entitled to no relief." The allegations of the 2255 motion must be accepted as true for purposes of determining whether or not to grant an evidentiary hearing. *Accord United States v. Briggs*, 939 F.2d 222, 228 fn. 17 (5th Cir. 1991).

Additionally, the remedy under Sec. 2255 was designed to be "exactly commensurate" with the federal habeas corpus remedy, *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224 (1977); *Hill v. United States*, 368 U.S. 424, 427, 82 S.Ct. 468 (1962); *United States v. Hayman*, 342 U.S. 205, 219, 72 S.Ct. 263 (1952), and has been construed in accordance with that design, e.g., *Sanders v. United States*, 373 U.S. 1, 6-14, 83 S.Ct. 1068 (1963).

> The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty.

Price v. Jonston, 334 U.S. 266, 269, 68 S.Ct. 1049 (1948).

(b) Summary dismissal is appropriate only where the allegations in the petition are "vague [or] conclusory" or "palpably incredible", *Blackledge v. Allison*, 431 U.S. 63, 75-76, 97 S.Ct. 1621, 1629-30 (1977) (quoting *Machibrada*, supra, at U.S. 495, S.Ct. at 514 (1961), or "patently frivolous or false". Id. at 76, 79 S.Ct. at 1630.

The pivotal question is whether or not the facts set forth in Petitioner's Sec. 2255 Motion, accepted as true, would warrant relief as a matter of law. Unless the answer is no, the district court has committed a patent abuse of discretion in

dismissing the Motion without giving the moving party the chance to establish the facts.

Petitioner raised claims in his Sec. 2255 that did not mandate invoking so drastic a measure as summary dismissal under Rule 4.

Petitioner's claimed errors were of a constitutional magnitude, supported by Supreme Court precedent, that directly affected his right to a fair trial and right to effective representation.

Specifically, Petitioner argued that his trial counsel rendered ineffective assistance by: (1) refusing to permit him to testify in his own behalf, contrary to this Court's holding in *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987); (2) failing to challenge a purposeful pretrial intrusion by the government upon his confidential communications with his attorney. The attorney/client meeting was recorded while Petitioner was in his attorney's office discussing trial preparations. This Court

previously held in *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190 (1966), that such a violation warranted a new trial; (4) failing to motion to suppress audio and visual recordings of Petitioner and an informant depicting what the prosecution alleged was a failed attempt by the DEA to sell Petitioner narcotics. The DEA failed to obtain judicial authorization prior to initiating the surveillance as mandated by Rule 41 of the Federal Rules of Criminal Procedure and was admitted into evidence contrary to the holding in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967) Nor were the tapes sealed in compliance with Title 18 U.S.C. Sec. 2518(8)(a), contrary to *United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845 (1990).

The video recording was highly prejudicial because it depicted a small child in the proximity of what the prosecution portrayed to the jury as an attempted narcotics transaction.

And finally, to satisfy the "cause" prong of *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Petitioner claimed in the courts below that his failure to raise the issues that could be raised in the Sec. 2255, i.e.; the issues preserved on the record, was due to ineffective assistance of appellate counsel.2

For instance, trial counsel objected to the government's admission of unscreened 404(b) evidence of Petitioner's prior state conviction, preserving it for appellate court review. The

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2. This Court held in *Murray v. Carrier*, 477 U.S. 478, 483, 488-89, 106 S.Ct. 2639 (1986), that ineffective assistance of counsel may itself provide cause for procedural default.

Previous Seventh Circuit precedent has recognized that a showing of ineffective assistance of appellate counsel establishes cause for a defendant's failure to raise a claim earlier. *Rosenwald v. United States*, 898 F.2d 585, 587 (1990).

prior bad act evidence was admitted through the solicited testimony of a prosecution witness. (Trial Transcript at 302) (Hereinafter "Tr. ___") Trial counsel motioned for a mistrial, which the court denied. (Tr. 394-95) No limiting instruction was provided to the jury. Petitioner's prior record was admitted completely contrary to this Court's holding in *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 1502 (1988).

In addition, defense counsel had submitted a pretrial motion *in limine* seeking to exclude prior bad acts of Petitioner's pursuant to Fed.R.Evid. 609(a), (Record at 41), which the court failed to address. Furthermore, the prior bad act evidence was more prejudicial than probative since his counsel, without his approval and inconsistent with his claim of innocence, inexplicably implicated him during summation by directing the following statement to the jury: "They (the defendants) are all involved in buying and selling drugs." (Tr. 1711) The very charges Petitioner was on trial for.

Petitioner's appellate counsel was clearly constitutionally ineffective for failing to raise the claims that were supported by the record.

The district court dismissed Petitioner's Motion despite its acknowledgment of his claim that his failure to raise these issues were the result of ineffective assistance of appellate counsel, and even though he had notified the court of his appellate counsel's refusal to comply with his appellate issues.

The lower court further found none of the grounds raised in Petitioner's Sec. 2255 to be "clearly stronger" than those raised by his appellate counsel on direct appeal. App. 5a, 19a.

It is unfathomable how the lower court could reason that Petitioner's appellate counsel could well have concluded that there was insufficient merit to pursue the issues he now complains, or that they would

have "detracted" from the arguments made on appeal. App.19a.3

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3. Petitioner's appellate counsel raised three completely frivolous arguments on direct appeal. First he argued that Wanda Young should not have been allowed to testify because she relied on documentary evidence taken from Petitioner and given to the IRS. There was no objection to this testimony at trial preserving it for review as the Seventh Circuit noted. Secondly, he argued that his client's right against self-incrimination was violated by the government's remarks. The Seventh Circuit pointed out that counsel failed to specify what comments constitute this abrogation of his rights. And finally, counsel argued that the district court "failed" to instruct the jury on multiple conspiracies. The Seventh Circuit rightly found that the district court properly instructed the jury. 24 F.3d at 915-17.

On December 18, 1996, the Seventh Circuit affirmed the district court's dismissal of the Motion reiterating much of the district court's findings.

In regard to the surreptitious pretrial intrusion by the government into Petitioner's attorney/client conference in Chicago, the Seventh Circuit mistakenly found that the record concerning the informant, Wanda Young's attendance in Chicago was fully developed before trial and therefore held that the claim could have been raised on appeal. App. 3a. The facts, however, are distinctly different in that the pretrial motion filed by trial counsel only noted an "unsuccessful attempt" by Young to be present during a post-indictment communication between Petitioner and counsel. (R. 40 at 3) The incident Petitioner now argues is when the government had Young successfully record the attorney/client conference on November 16, 1991, which Petitioner's trial counsel was

unaware of at the time he filed the motion. Young had wrote Petitioner a letter on August 8, 1992, informing him that she was "wired" while at his attorney's office. Young's letter was made part of the record in the court below. (R.120). Wanda Young, at the direction of the DEA agent, deceptively led Petitioner to believe that she was in need of counsel due to, as she claimed, the agent harassing her for information. This scheme was perpetrated by the agent for the sole purpose of learning privileged defense strategy, a practice this Court repeatedly denounced. e.g.; see *Maine v. Moulton*, 474 U.S. 159, 171, 106 S.Ct. 477, 487 (1985). The Court commented:

> we...have made clear that, at the very least, the prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. Id.

The prosecution used the information recorded by Young to structure their witness testimony accordingly. It is noteworthy to add that the government refused to disclose the tape to the Petitioner so as to determine the exact contents and its effect on his counsel's preparation for trial.

This blatant pretrial intrusion denied Petitioner due process of law and unconstitutionally tainted the trial process.

Ineffective assistance claims are often based on assertions that counsel made errors of omission, errors that are difficult to perceive from the record: For example, why Petitioner's counsel refused to permit him to testify in his own defense? Why defense counsel failed to challenge the admission of an unauthorized video recording (with audio sound) which took place in a hotel suite where a justifiable expectation of privacy existed.

This Court held that the use of video surveillance in a non-public place where a

constitutionally protected expectation of privacy exists judicial authorization is required and would otherwise implicate the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967).

The court below, in an earlier decision, made its view clear that a warrant for television surveillance that did not satisfy the Fourth Amendment's requirement of particularity would violate the Fourth Amendment. *United States v. Torres*, 751 F.2d 875, 885 (7th Cir. 1984).

Remarkably, the court below in a comparable, but unrelated case held, where a defendant had different counsel at trial and on appeal, that:

> ...failure of petitioner to raise ineffective assistance of counsel claim on direct appeal did not preclude its consideration on his motion to vacate,

set aside or correct sentence, insofar as claim was based on trial counsel's failure to file motion to suppress evidence.

Bond v. United States, 1 F.3d 631 (7th Cir. 1993) ("A defendant who presents an ineffective counsel claim for the first time on direct appeal has little to gain and everything to lose." Id. at 635). *Cf*. *Holman v. Page*, 95 F.3d 481 (7th Cir. 1991) (Holding under this Court's *Strickland* test no prejudice exists when evidence gathered in violation of the Fourth Amendment is erroneously admitted at trial). On petition for rehearing *en banc*, 102 F.3d 872, the three dissenting judges in *Holman* expressed concern over the majorities disregard of clear Supreme Court precedent by choosing to adopt instead of separate opinion of Justice Pewel J. in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986), noting that other courts of appeals have followed the *Kimmelman* holding,

including the Seventh Circuit before the *Holman* opinion. Id. at 873.

The dissenting judges in *Holman* further commented that:

> The panel holds that ineffectiveness of counsel can never be shown by demonstrating that counsel's performance fell below the standard set forth in *Strickland* when the issue counsel failed to raise was based upon the Fourth Amendment, because as a matter of law no "prejudice" results. In my view, this conclusion is inconsistent with the governing Supreme Court law in this area. ...The panel's decision squarely conflicts with the Supreme Court's holding in *Kimmelman* that defendants may properly base ineffective assistance of counsel claims in a habeas corpus action

> on the assertion that their attorney failed properly to litigate a Fourth Amendment claim.

Holman, supra, at 873.4

See *Huygh v. King*, 95 F.3d 1052 (11th Cir. 1996), reaching the opposite conclusion on the same day as the decision reached in *Holman*.

The district court should have ordered an evidentiary hearing on Petitioner's claims

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4. In *Stone v. Powel*, 428 U.S. 465, 96 S.Ct. 3037 (1976), this Court held that because Fourth Amendment rights ought to be litigated at trial, defendants cannot invoke habeas review to attack Fourth Amendment errors. However, ten years later, this Court in *Kimmelman v. Morrison*, 477 U.S. 365, 378 fn. 3, 106 S.Ct. 2574, 2584 & fn. 3 departs from this prohibition only where, as here, a defendant claims that the failure to assert Fourth Amendment rights constituted ineffective assistance of counsel.

of ineffective assistance of counsel and to evaluate the ensuing prejudice sustained as a result of the government's surreptitious intrusion upon his confidential communications with counsel. These issues require an assessment beyond the scope of the present record.

The court below previously acknowledge in *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), that:

> ...In the usual case extrinsic evidence is necessary to prove that counsel's assistance was ineffective, because without such evidence counsel's apparent pratfalls will be presumed to be failed strategems rather than professional malpractice.

An evidentiary hearing should be held when there are important issues of fact which were not adequately developed at trial, the failure to

develop the facts was not due to the defendant's neglect or deliberate bypass, and the record does not conclusively demonstrate that the petitioner is entitled to no relief. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745 (1963).

The effectiveness of Petitioner's trial lawyer's performance cannot be evaluated without an evidentiary hearing at which time the lawyer is asked to explain why he did not follow seemingly promising lines of defense.

Petitioner avers that his trial and appellate counsels' negligence fell so far below minimal standards that the results of his trial was unreliable and fundamentally unfair.

This Court must agree that Petitioner's claims, when unanswered, cannot be characterized as so incredible or frivolous as to warrant summary dismissal.

The district court's decision to invoke Rule 4(b) was an abuse of discretion

when Petitioner had set forth his claims for relief with some specificity and included relevant citations to the record.

Summary dismissal of the Motion does not square with case law defining what constitutes the exercise of sound judicial discretion in the context of ruling on a *pro se* Sec. 2255 motion. Wherefore, Petitioner prays that the Court grant the Writ of Certiorari and reverse the summary dismissal of the Sec. 2255 Motion and remand the case to the district court for an evidentiary hearing in order to develop a factual record.

Certiorari ought to be granted on this issue for the reasons indicated.

Respectfully submitted,

Steven D. Donovan,
pro se
Reg. No. 03293-089
U.S.P. Leavenworth, KS
66048-1000

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT-WITHOUT ORAL ARGUMENT

Date: December 18, 1996

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

No. 95-2720

STEVEN D. DONOVAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Eastern District of Wisconsin
Nos. 91 CR 265 & 95 C 473, J.P. Stadtmueller, Chief Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted October 11, 1996*
Decided December 18, 1996
Before

Hon. WILLIAM J. BAUER,
Circuit Judge

Hon. RICHARD D. CUDAHY,
Circuit Judge

Hon. KENNETH F. RIPPLE,
Circuit Judge

STEVEN D. DONOVAN,
Petitioner-Appellant,
No. 95-2720 v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 95 C 473
J.P. Stadtmueller,
Chief Judge.

*This successive appeal has been assigned to the original panel under Internal Operating Procedure 6(b). The panel heard oral argument on the initial appeal and is unanimously of the view that a second argument is unnecessary.

ORDER

Steven Donovan, along with three others, was convicted of cocaine trafficking and sentenced to life imprisonment. His conviction was affirmed by this court on appeal. United States v. Donovan, 24 F.3d 908 (7th Cir. 1994). Donovan then filed a pro se petition under 28 U.S.C. Sec. 2255 to vacate, set aside, or correct his sentence. The district court found that Donovan procedurally defaulted all of his claims by failing to raise them on direct appeal, and summarily dismissed the petition. On appeal, Donovan argues that the district court erred in summarily dismissing his petition because (1) there was an insufficient record developed at trial to allow him to challenge on direct appeal the government's intrusion upon his confidential communications with counsel; (2) forfeiture of his property caused his criminal sentence to be imposed in violation of the Double Jeopardy Clause under the Fifth Amendment; and (3) his trial and appellate counsel both rendered ineffective assistance.

We assume familiarity with the facts from our prior opinion and do not restate them here.

In reviewing the district court's denial of Donovan's Sec. 2255 motion, we review all factual determinations for clear error and consider all questions of law *de novo*. *Bond v. United States*, 77 F.3d 1009, 1012 (7th Cir.), *cert. denied*, 117 S.Ct. 270 (1996). Relief may be available if Donovan can demonstrate flaws in his conviction or sentence "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice." *Boyer v. United States*, 55 F.3d 296, 298 (7th Cir.), *cert. denied*, 116 S.Ct. 268 (1995). However, a Sec. 2255 motion is not a substitute for a direct appeal. *Doe v. United States*, 51 F.3d 693, 698 (7th Cir.), *cert. denied*, 116 S.Ct. 205 (1995). An argument that was not raised on direct appeal cannot first be presented on collateral review "absent of showing of cause' for the failure to advance the argument sooner 'and some showing of actual prejudice resulting from the

alleged constitutional violation.'" *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)).

Donovan first argues that the record was insufficiently developed at trial to mount a challenge on direct appeal to the government's infiltration of his privileged communications with counsel. This argument requires some background information. Shortly after Donovan had been released on bond, he and his codefendants met with their lawyers in Chicago. At Donovan's insistence, his girlfriend Wanda Young also attended that meeting. Donovan wanted Young to sign an affidavit prepared by counsel asserting that she could not remember any of the alleged events in the conspiracy due to her long-time cocaine usage. Young, who at the time was working with the government as an informant, had been equipped with a wire transmitter in case Donovan attempted to prevent her from testifying against him at his upcoming trial.

Subsequently, yet still before trial, Donovan filed a motion to suppress, alleging that the government had paid Young to solicit information from him during his privileged communications with counsel. (R.40, at 3.) A magistrate judge recommended that the motion be denied (R.53, at 13-14), and Donovan filed objections. (R.65,67.) The district court rejected the objections and denied the motion. (Tr. of 2/19/92, at 188-90.) The government did not introduce at trial any information relating to Young's attendance at the Chicago meeting.

For his direct appeal, Donovan obtained new counsel, but appellate counsel did not pursue the issue of the government's alleged intrusion into Donovan's attorney-client communications. Donovan renewed the claim in his Sec. 2255 petition, but the district court found the claim procedurally defaulted because Donovan failed to raise it on direct appeal. Donovan now contends that the record developed at trial was

insufficient to permit raising the claim on direct appeal.

Contrary to Donovan's contention, the record concerning Young's attendance in Chicago was fully developed before trial and could have been raised on appeal. This claim was the subject of Donovan's pretrial motion to suppress evidence and was addressed by the magistrate judge who recommended that Donovan's motion be denied. Donovan could have challenged the denial of his motion to suppress on direct appeal, but he did not. Having bypassed the opportunity to raise the claim on direct appeal, Donovan may not demand belated review without demonstrating cause for the default and actual prejudice. *Scott v. United States*, 997 F.2d 340, 343 (7th Cir. 1993). Donovan has shown neither.

Donovan next argues that the forfeiture of several items of his personal property under 21 U.S.C. Sec. 881 along with his criminal sentence constituted double jeopardy. This claim is foreclosed by the Supreme Court's recent decision in *United States v. Ursery*, 116

S.Ct. 2135, 2146-47 (1996). In *Ursery*, the Court held that *in rem* civil forfeitures under Sec. 881 were not "punishment" for purposes of the Double Jeopardy Clause. *Id.* at 2149. The forfeiture of Donovan's property did not place him in jeopardy a second time. *Id; United States v. $87,118.00 in U.S. Currency*, 95 F.3d 511, 514-15 (7th Cir. 1996).

Donovan also contends that his Sixth Amendment right to counsel was violated because his trial lawyer was ineffective. Specifically, Donovan asserts that trial counsel rendered ineffective assistance by preventing him from testifying at trial. In addition, Donovan argues that counsel was ineffective in failing to object to (1) the government's use of Al Cadena's and Rick Kizel's guilty pleas as evidence of Donovan's guilt; (2) the government's use of evidence of Donovan's prior state record; (3) the district court's decision to not exclude evidence regarding Donovan's material possessions and financial status; and (4) the court's decision to not exclude several audio and video

recordings of attempted drug transactions.

Donovan failed to raise all of these claims on direct appeal. Claims of ineffective assistance which are based upon the trial record alone must be brought on direct appeal or they are procedurally defaulted. *Guinan v. United States*, 6 F.3d 468, 472 (7th Cir. 1993); *Bond v. United States*, 1 F.3d 631, 635 (7th Cir. 1993); *United States v. Taglia*, 922 F.2d 413, 418(7th Cir. 1991). Although Donovan argues that his failure to raise these claims on direct appeal was caused by the ineffective assistance of appellate counsel, Donovan bears a heavy burden in overcoming the presumption that counsel rendered reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To establish ineffective assistance, Donovan must show "that counsel's representation fell below an objective standard of reasonableness" and, additionally, "that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

We have repeatedly emphasized that appellate counsel need not advance every conceivable argument on appeal. Appellate counsel is constitutionally ineffective only if "counsel fails to raise issues that are (1) obvious, and (2) clearly stronger than the ones raised." *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994). The issues Donovan cites here are neither obvious nor clearly stronger than those presented and decided on direct appeal. *Donovan*, 24 F.3d 908 (7th Cir. 1994). The district court concluded, and we agree, that counsel could reasonably have determined that there was insufficient merit to pursue these issues, or that raising these issues would have detracted from the arguments made on appeal. *See Velarde v. United States*, 972 F.3d 826, 829 (7th Cir. 1992).

Finally, Donovan argues that the district court erred by not conducting an evidentiary hearing on his claims of ineffective assistance of trial counsel. However, Donovan never asked the district court to hold such a hearing. Because Donovan failed to request an evidentiary hearing, the district court could not be expected to be a "mind reader[]" and convene one. *United States v. Mala*, 7 F.3d 1058, 1062 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1839 (1994). In any event, none of the allegations in Donovan's petition warranted a Sec. 2255 hearing. *See Key v. United States*, 806 F.3d 133, 140 (7th Cir. 1986).

AFFIRMED.

June 12, 1995

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN
STEVEN D. DONOVAN,

Petitioner,

JUDGMENT IN A CIVIL CASE

V.

UNITED STATES OF AMERICAN,

Respondent.
CASE NUMBER: 95-C-473
(91-Cr-265)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Donovan's motion to vacate, set aside, or correct his sentence be and the same is hereby summarily DISMISSED pursuant to Rule 4 of the Federal Rules Governing Sec. 2255 Proceedings; and

IT IS FURTHER ORDERED that Donovan's request for leave to proceed *in forma pauperis* be and the same is hereby DENIED as moot.

6/12/95 SOFRON B. NEDILSKY
Date Clerk

Copy mailed to attorneys for parties by the Court pursuant to Fed.R.Civ.P.77(d).

"s/Michael Kramer"
(By) Deputy Clerk

June 9, 1995

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF WISCONSIN

STEVEN D. DONOVAN,

Petitioner,

Case No. 95-C-473
(91-CR-265)

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

On January 7, 1992, a grand jury returned a six-count superseding indictment charging four persons, including Steven D. Donovan, with offenses related to cocaine trafficking. All four defendants proceeded to trial. On February 27, 1992, the jury returned guilty verdicts against each of the defendants on all counts. The defendants appealed their convictions, and the Seventh Circuit affirmed.

UNITED STATES v. DONOVAN, 24 F.3d 908 (7th Cir.), cert. denied, __ U.S. __, 115 S.Ct. 269 (1994). On May 1, 1995, Donovan filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. Sec. 2255. Donovan's motion presently is before the court for preliminary consideration pursuant to Rule 4 of the Federal Rules Governing Sec. 2255 Proceedings.

I. BACKGROUND

The four defendants, Donovan, Vincent Donovan, Patrick A. Shea, and Stephen J. Dineen, were charged with being members of a conspiracy to possess with intent to distribute cocaine from 1986 to 1991. According to the testimony at trial, Donovan's brother, Vincent, who lived in Milwaukee, met Al Cadena in Miami in 1985 and bought three ounces of cocaine from him. At that time, they discussed the possibility of future deals. About a week later, Vincent telephoned Cadena and told him that he would travel to Miami to buy more cocaine.

Vincent bought seven ounces of cocaine from Cadena and told him that he knew others that would be interested in Cadena's cocaine because of its quality and price.

In February or March 1986, Vincent met with Cadean again, this time purchasing 250 grams of cocaine, approximately half on a "front" basis. About a month later, both Donovan and Vincent travelled to Miami. They bought a half kilogram of cocaine from Cadena and told him they would split the cocaine between the two of them to sell to customers. In April 1986, the Donovan brothers again met with Cadena in Miami. They paid Cadena what they owed him from the last purchase and bought another kilogram of cocaine.

In June 1986, Cadena travelled to Milwaukee to meet the Donovans. The brothers paid Cadena for the previous deal, and Cadena met Donovan's girlfriend, Wanda Young. They also discussed future transactions.

Donovan and Young transported cocaine from Miami to Milwaukee. During their first buying trip in October 1986, Donovan and Young bought between nine ounces and two kilograms of cocaine from Cadena, which Young taped to her body in order to transport the cocaine on the plane. Donovan and Young made additional trips to Miami in December 1986 and January 1987. On each trip, they purchased between a half and a full kilogram of cocaine from Cadena with money belonging to the Donovans.

Rich Kizel, the employer of defendant Stephen Dineen, bought cocaine from Patrick Shea beginning in December 1987. In February 1988, Kizel bought five to six ounces of cocaine from Shea, and the two of them purchased a kilogram from a Chicago-based supplier. In March 1988, Kizel contacted Vincent and asked if he should bring any cocaine back to Milwaukee from Miami. Vincent put Kizel in contact with Cadena, who sold Kizel between a half and a full kilogram of cocaine. Cadena also fronted

Kizel another kilogram to deliver to Vincent.

In April 1988, Vincent informed Cadena that he would change his business to a Chicago-based supplier because it was too risky to transport cocaine to Milwaukee from Miami. Cadena travelled to Milwaukee to meet with the Donovans. After talking to them, Cadena understood that the Donovans would purchase cocaine from Cadena when Kizel could transport the cocaine from Miami to Milwaukee. In November and December 1988, Kizel went to Miami twice and bought a kilogram of cocaine from Cadena each time. Kizel and Shea also bought cocaine from the Chicago dealer during this time.

In December 1988, Kizel, Shea, and Vincent met to discuss purchasing larger amounts of cocaine from Cadena. To facilitate the larger shipments, Kizel proposed that they rent a storage shed in Kizel's girlfriend's name and keep a car in the shed. The cocaine would be hidden in the car's engine compartment. Shea

and Vincent agreed, and Shea provided an abandoned car for the project. On December 26, Kizel's girlfriend rented two storage sheds in West Allis. Kizel, Shea, and Vincent placed the car on a trailer provided by Vincent and put the car and trailer in the larger of the two sheds. Kizel gave the keys to Shea and Vincent. The abandoned car was never used as planned by Shea and Vincent because they bought cheaper cocaine from Chicago in early 1989.

In January 1989, Kizel moved to Florida and purchased two kilograms of cocaine from Cadena. Kizel arranged for the transport of the cocaine to Milwaukee. One fourth of the cocaine was fronted to Shea (whom Kizel instructed to pay Vincent for the cocaine). Cadena believed that one kilogram was for Vincent.

In mid-February 1989, Kizel obtained three kilograms of cocaine from Cadena. Vincent arranged the purchase and told Cadena that one kilogram was for his customers.

The other two kilograms were for Shea. Cadena and Vincent also made arrangements for Kizel to pick up another three kilograms for Vincent. About a week later, Kizel purchased another five kilograms of cocaine from Cadena, two for himself and three for Vincent. Kizel gave the cocaine to a courier, who transported it to Milwaukee and put it in one of the storage sheds.

On February 22, 1989, Kizel learned that law enforcement was searching his two sheds. During the search, DEA officials seized the car and trailer. No cocaine was seized, as the courier had placed the cocaine in a different shed facility. Fearing that the other shed would be searched as well, Kizel divided his two kilograms of cocaine into five separate eight-ounce packages and placed the packages in another storage shed belonging to one of his customers, John Unger. Kizel instructed Unger to remove the packages immediately.

Kizel took the remaining three kilograms of cocaine to yet another storage shed. He took about 12 ounces of the cocaine to Shea to get rid of it. Kizel and Vincent then picked up Vincent's three kilograms from the storage shed. Kizel departed for Florida by car. After telephoning Unger while en route, Kizel learned that Unger had been arrested and that the cocaine from Unger's shed had been seized.

In March 1989, Vincent and his girlfriend drove to Miami to meet with Kizel. Kizel told Vincent that the sheds had been raided and Vincent's trailer seized. Vincent and Kizel purchased two kilograms of cocaine from Cadena and discussed transporting future shipments of cocaine to Chicago. A week later Vincent advised Kizel that he was being investigated and should not return to Milwaukee.

On April 20, 1989, Cadena checked into the Allerton Hotel in Chicago and informed Vincent that he was ready to conduct a multiple-kilogram deal.

Vincent, along with his father and brother-in-law, went to the hotel and told Cadena that they did not yet have the money for the deal. Vincent proposed that he talk to his other supplier, who could buy ten kilograms of cocaine at a time from Cadena if Cadena could wait a few days. Cadena developed back problems, however, and had to leave Chicago before the deal was consummated.

Through June 1990, the Donovan brothers continued to deal with Cadena in Miami. Kizel was arrested in June 1990 and agreed to cooperate with law enforcement authorities. Kizel reported several conversations with Donovan to law enforcement authorities, including the facts that Donovan was getting cocaine from Shea but was looking for better prices, that he was selling between two and ten ounces of cocaine a week, and that he had transported cocaine purchased from Cadena by taping it to his girlfriend's stomach. On June 6, 1991, Donovan was videotaped in a Milwaukee motel with Kizel and an undercover

DEA agent while negotiating the purchase of one or more kilograms of cocaine. Donovan did not go through with the purchase and told Kizel that he suspected him of setting him up.

Eventually, law enforcement authorities obtained enough evidence against the four defendants to commence prosecution. At trial, several witnesses, including Kizel, Cadena, and Young, testified that the Donovan brothers sold cocaine in the Milwaukee area during the time of the conspiracy. The jury returned a guilty verdict against all four defendants. On October 29, 1992, a judgment of conviction was entered against Donovan. The court sentenced Donovan to life imprisonment, as mandated by statute.

Donovan appealed his conviction, arguing (1) that Young should not have been allowed to testify because she relied on documentary evidence improperly taken from Donovan and given to the IRS, (2) that the government made several

improper remarks during its closing and rebuttal, and (3) that the district court erred in failing to give a jury instruction regarding a multiple conspiracy theory. The Seventh Circuit found each of these arguments without merit and affirmed Donovan's conviction, along with those of his codefendants. Donovan now seeks collateral relief under Sec. 2255.

II. DISCUSSION

Sec. 2255 allows federal prisoners to collaterally challenge their sentences on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. Sec. 2255. Like habeas corpus, Sec. 2255 "is confined to correcting errors that vitiate the sentencing court's

jurisdiction or are otherwise of constitutional magnitude." Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993).

Sec. 2255 "will not be allowed to do service for an appeal." Theodorou v. United States, 887 F.2d 1336, 1339 (7th Cir. 1989). "[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Thus, district courts generally may not reach the merits of an appealable issue in a Sec. 2255 proceeding unless that issue has been previously raised on direct appeal. Theodorou, 887 F.2d at 1340. However, a petitioner may obtain collateral relief based on trial errors not challenged on direct appeal upon a showing of "(1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 168. A petitioner's burden of showing actual prejudice entails establishing "not merely that the errors at his trial created

a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170.

Here, Donovan argues that his sentence should be vacated for eight reasons: (1) the government improperly used Cadena's and Kizel's guilty pleas as evidence of Donovan's guilt; (2) the government improperly used evidence of Donovan's prior state and criminal record; (3) the district court should have excluded evidence regarding Donovan's material possessions and financial status; (4) the district court should have excluded several audio and video recordings of attempted drug transactions because the government failed to get prior judicial authorization to record the conversation; (5) the civil forfeiture of Donovan's property and his criminal sentence constitute double jeopardy; (6) Donovan's trial counsel prevented him from testifying at trial; (7) the government sent a wired

informant, posing as a potential codefendant, to a meeting between the defendants and their counsel; and (8) Donovan's trial and appellate counsel rendered ineffective assistance by failing to object to the above alleged errors at trial and by failing to raise the above alleged errors on appeal.

Each of the grounds raised in Donovan's petition was not raised either at trial or on appeal. Thus, unless Donovan can show cause and actual prejudice, I will be obliged to conclude that he has defaulted his claims. Donovan appears savvy of this limitation, as he goes on to argue that the failure to raise those grounds either at trial or on appeal resulted from ineffective assistance of counsel.

In the context of alleged ineffective assistance of counsel, the "cause and actual prejudice" standard applicable to collateral attacks means that an ineffective-assistance claim based on the record must be raised on direct appeal or it is waived. However, if an

ineffective-assistance claim is based on new evidence, or if the defendant had the same counsel for trial and appeal, then a petitioner may raise it at the collateral stage. Guinan, 6 F.3d at 472.

Here, Donovan had different counsel at trial and on appeal. He did not raise the errors alleged in his petition, including ineffective assistance of counsel at trial, on appeal. Attempting to avoid procedural default, Donovan argues that the failure was due to ineffective assistance of cou[illegible] on appeal.

"So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Murray v. Carrier, 477 U.S. 478, 488 (1986). Further, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural

default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." Murray, 477 U.S. at 492. Thus, if the performance of Donovan's appellate counsel meets the Strickland test for constitutional adequacy, "cause" for his procedural default will not be found based on ineffective assistance of counsel, and all allegations raised in his petition that were not brought on direct appeal are barred from consideration.

To prevail on an ineffective-assistance claim, a petitioner must show that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's professional errors, the result of the trial would have been different. Strickland, 466 U.S. at 687-88, 694. If the court determines that the petitioner has failed to satisfy either requirement,

it need not address the other. Chichakly v. United States, 926 F.2d 624, 630-31 (7th Cir. 1991). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

The Seventh Circuit has described the standard by which a district court should examine a petitioner's claim that his appellate counsel rendered ineffective assistance by failing to raise certain issues on appeal:

> Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial ... When a claim of ineffective assistance is based on failure to raise viable

> issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985); see also Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir. 1994).

The failure of Donovan's appellate counsel to raise all the issues which Donovan argues were viable was not objectively unreasonable. It fell within the ambit of trial tactics or strategy, which are protected by a strong presumption of reasonableness. Strickland, 466 U.S. at 689. Donovan's appellate counsel raised

several issues on appeal, which the Seventh Circuit addressed in a relatively lengthy, and published, opinion. His attorney could well have concluded that there was insufficient merit to pursue these issues, or that they would have detracted from the arguments made on appeal. See Velarde v. United States, 972 F.2d 826, 829 (7th Cir. 1992). I find none of the grounds raised in Donovan's petition to be "clearly stronger" than those raised on appeal. I do not find Donovan's appellate counsel's performance deficient under Strickland and Greer, and thus I need not address Strickland's prejudice prong. Having failed to show that his appellate counsel rendered ineffective assistance, Donovan likewise has failed to show cause for his procedural default of the issues raised in his petition.

III. CONCLUSION

Donovan has failed to show cause for failing to raise on direct appeal the grounds raised in his petition. I conclude that it plainly appears from the face of Donovan's motion and exhibits

that he is not entitled to relief and thus I am obliged to summarily dismiss his petition.

Accordingly,

IT IS ORDERED that Donovan's motion to vacate, set aside, or correct his sentence be and the same is hereby summarily **DISMISSED** pursuant to Rule 4 of the Federal Rules Governing Sec. 2255 Proceedings; and

IT IS FURTHER ORDERED that Donovan's request for leave to proceed *in forma pauperis* be and the same is hereby **DENIED** as moot.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 9th day of June, 1995.

BY THE COURT:

"s/J.P. Stadtmueller"
U.S. District Judge